

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Norena A. Hale,

Employee,

VS.

FINDINGS OF FACT,  
CONCLUSIONS  
AND ORDER

Minnesota Department  
of Education,

Employer.

The above-entitled matter came on for hearing before Bruce D. Campbell, Administrative Law Judge from the State Office of Administrative Hearings, on August 17, 18, 19 and 21, 1992 and September 15, 1992 in Minneapolis, Minnesota.

Appearances: Andrea F. Rubenstein, Attorney at Law, One Financial Plaza, 120 South Sixth Street, Minneapolis, Minnesota 55402, appeared on behalf of Norena A. Hale, Ph.D. (Dr. Hale, Employee, or Petitioner); and Sharon A. Lewis, Special Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, appeared on behalf of the Minnesota Department of Education (Department or Employer).

The record of this proceeding closed on November 3, 1992, with the receipt by the Administrative Law Judge of the Reply Memorandum of Law and Proposed Findings filed by the Employee.

NOTICE

Pursuant to Minn. Stat. 43A.33, subd. 4 (1990), this Order is the final decision in this case. Under Minn. Stat. 43A.33, subd. 4 (1990), however, any party aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 - 14.68 (1990).

STATEMENT OF ISSUES

The issues to be determined in this proceeding are as follows:  
(1) whether the Employee, Dr. Norena A. Hale, was "demoted" within the meaning of Minn. Stat. 43A.33, subd. 1 (1990), when she was removed from her assignment as Manager of the Unique Learner Needs Section (ULNS) with the Minnesota Department of Education; (2) if so, whether that demotion was for just cause; (3) and, if not, what remedy, if any, is appropriate,

Based upon all of the files, records and proceedings, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

1. Norena A. Hale, Ph.D., is a permanent classified employee of the Minnesota Department of Education. Her civil service classification is Education Specialist IV. She has had and retained that civil service classification at all times material to this proceeding.

2. Dr. Hale's educational background and work experience are concentrated in the area of special education and special education administration. The Employee received a Ph.D. in education administration with an emphasis on special education administration in August of 1979.

3. Dr. Hale has been an employee of the Department of Education since August 1980. In 1980, the Employee was initially hired as an Assistant Manager of the Special Education Section of the Department of Education. From August of 1984 through September of 1985, Dr. Hale served as Acting Manager of the Section. On July 1, 1986, she was promoted to Manager of the Special Education Section. Upon her assumption of duties as Manager, additional program responsibilities connected with instruction for disadvantaged students, students with limited English proficiency and migrant education were assigned to her section. The name of the Special Education Section was changed to the Unique Learner Needs Section (ULNS) in July of 1986.

4. Except for her actions in 1990 discussed in subsequent Findings which related to the St. Paul Proposal, Dr. Hale's career as a classified employee has been marked by regular promotions, superior or outstanding performance evaluations and the absence of any disciplinary action. A performance report for Dr. Hale, issued in July of 1990, after her removal as Manager of the ULNS, rated Dr. Hale's overall performance to be significantly above average. EE Ex. 17. For her performance in fiscal year 1989-1990, she received a merit increase of approximately \$3,400.

5. During the hearing, the Department stipulated that neither Dr. Hale's qualifications, nor her performance are at issue in this proceeding, except as to her conduct regarding the St. Paul Proposal.

6. Dr. Hale's Position Description as Manager of the ULNS, dated October 20, 1989, accurately describes her duties and responsibilities in that position. Her duties included the following: supervision of a staff of over 50 people and a budget of approximately \$250,000,000; performing comprehensive planning and management; and proposing, promulgating and interpreting state and federal rules, regulations and statutes affecting the programs she was to oversee. Dr. Hale was charged with evaluating and enforcing compliance with these state and federal legal requirements and ensuring their implementation.

Failure by the Department to implement governing federal laws and regulations could potentially result in the loss for the State of over \$30 million in federal special education funds.

7. One of Dr. Hale's duties as Manager of ULNS was to take an active role in the Department's legislative initiatives, including drafting of legislation, making herself available for questions by state legislators and their staff, monitoring the progress of legislation, and related duties. It had also been her responsibility to review legislation proposed by individual school districts or other agencies or organizations related to special

education and advise the Commissioner of Education on any issues or problems raised by such proposals.

8. In January of 1990, Mr. Thomas Nelson was appointed by the Governor to serve as Commissioner of Education. Commissioner Nelson selected Mae Gaskins as Assistant Commissioner of Education. Ms. Gaskins became Dr. Hale's immediate superior.

9. Dr. Hale did not approve of Commissioner Nelson's approach to the area of special education. He had no specific training or experience with the highly regulated and complex field of special education and its laws and regulations. Commissioner Nelson viewed such regulations as largely "red tape" which could adversely affect the implementation of programs he believed were desirable.

10. Dr. Hale resented Commissioner Nelson and Ms. Gaskins because of their approach to the statutes and rules and regulations, both state and federal, that applied to special education programs. On several occasions, Commissioner Nelson had appeared before groups, including school districts, to explain his special education philosophy. In general, he wanted more flexibility -- to allow school districts to "do what they wanted to do". He would always state that he did not want districts to break the law. Dr. Hale interpreted Commissioner Nelson's approach to be an open invitation to the districts to disregard governing statutes and rules and regulations if they chose to do so and to require opposing groups to sue to enforce the law. Dr. Hale also had a personality conflict at least with Mae Gaskins, her supervisor. She believed that Mae Gaskins was confrontive and hostile. At a meeting on February 5, 1990, Mae Gaskins challenged Dr. Hale in an area of her expertise in special education. In another meeting of February 16, 1990, for example, Dr. Hale was "more concerned about Mae Gaskins' and Commissioner Nelson's conduct than the St. Paul Proposal". On other occasions, the Employee considered Mae Gaskins to be confrontive and that it was necessary for Dr. Hale to "get to the bottom line".

11. Dr. Hale believed that the atmosphere in the Department regarding special education changed when Commissioner Nelson assumed office. Dr. Hale described the atmosphere as tense and confrontive. On some occasions, she stated that the Commissioner would lose his temper when dealing with staff of the different divisions of the Department.

12. Dr. Hale also distrusted the St. Paul School District and its representatives. On several past occasions, under a former commissioner, the St. Paul School District had attempted to obtain waivers from some governing legal requirements. Some of these proposals had been rejected by former

Commissioner Ruth Randall, upon the advice of Dr. Hale and her staff. The St. Paul School District had also been the subject of some federal special education audits. Dr. Hale believed that the St. Paul School District was attempting, through a proposal that later came to be known as the "St. Paul Proposal", to circumvent or ignore state and federal law. She further believed that the Commissioner, through a lack of understanding of the applicable statutes and rules and regulations related to special education fund use, was underwriting, in an official way, this attempt by the St. Paul School District.

13. In late January or early February of 1990, Dr. Hale received a first draft of a concept paper from Bernie Dailey, Director of Special Education for the St. Paul School District. The concept paper, as revised, was ultimately adopted as legislation and came to be known as the "St. Paul Proposal". The St. Paul Proposal had two objectives: the use of state special education funds for "at risk" students not identified as handicapped under federal law, for purposes of preventive services, and integration of regular and special education programs or "mainstreaming". The St. Paul Proposal position paper went through a series of drafts. See, DOE Ex. L and DOE Ex. N. The initial form of the proposal, bearing a date of December 28, 1989, is contained in DOE Ex. N. The legislation that ultimately was adopted embodying the St. Paul Proposal is Laws of 1990, ch. 562, art. 3, 12, of which administrative notice has been taken. Neither policy objective of the St. Paul Proposal is, necessarily, illegal. Depending upon how the objectives were accomplished, however, federal regulations governing special education might be violated. When Dr. Hale initially received the draft, she had some general concerns about how the proposal would be implemented and how it would mesh with federal regulations. She did not, however, know, at that point, that the St. Paul Proposal would become a priority of Commissioner Nelson. Dr. Hale personally disagreed with the policy objective of using special education funds for "at risk" students.

14. By letter dated February 2, 1990, Mr. Dailey informed Dr. Hale that the St. Paul delegation would be traveling to Kitchener, Ontario, Canada to visit schools in Canada where the objectives contained in the St. Paul Proposal were being implemented. DOE Ex. J. The trip to Ontario was to take place March 21-23, 1990. Dr. Hale assumed that she would be working on the Proposal with the St. Paul School District during that trip. Because of subsequent events, described in later Findings, Dr. Hale did not travel to Canada with representatives of the St. Paul School District.

15. Sometime in early 1990, Commissioner Nelson expressed his full support for the St. Paul Proposal. The date of his endorsement of the Proposal and the circumstances under which that endorsement was obtained were not the subject of evidence produced at the hearing. It is clear, however, that Commissioner Nelson expressed support for the St. Paul Proposal before he discussed its twin policy objectives with Dr. Hale.

16. The fact of the Commissioner's support for the St. Paul Proposal was the subject of office discussion in Dr. Hale's Section. The general prevailing view was that the Commissioner fully supported the Proposal and that problems with it were not to be raised.

17. On February 16, 1990, Dr. Hale met with Mae Gaskins, the Assistant

Commissioner to whom Dr. Hale reported. Assistant Commissioner Gaskins said to Dr. Hale, "The Commissioner is concerned that you support the St. Paul Proposal." Dr. Hale interpreted this statement by Assistant Commissioner Gaskins to be confrontational and she believed that her role in the Department as head of special education was being circumvented. Dr. Hale felt she "had to get to the bottom line" with Assistant Commissioner Gaskins. Dr. Hale responded, "I have concerns about its legality." Assistant Commissioner Gaskins then said, "Then you will have trouble supporting it." At that point, Dr. Hale and Assistant Commissioner Gaskins discussed the subject of commingling of special education funds and some other federal special education requirements that Dr. Hale felt might be involved. Assistant

Commissioner Gaskins said she didn't understand the federal regulations or Dr. Hale's concerns. At some point in the conversation, Assistant Commissioner Gaskins said, "if you can't support the Department's position, I don't want you to testify." Dr. Hale responded, "That's fine, but if I am asked questions, I will respond to the best of my ability as to what the federal rule or law requires." Assistant Commissioner Gaskins did not respond to Dr. Hale's statement. Dr. Hale was not asked to testify about the Proposal. Assistant Commissioner Gaskins also asked Dr. Hale not to attend legislative hearings where the Proposal was to be discussed. As a result of her meeting with Assistant Commissioner Gaskins on February 16, 1990, Dr. Hale stated that she was more concerned with the actions and attitudes of Assistant Commissioner Gaskins and Commissioner Nelson than she was about the St. Paul Proposal.

18. On February 22, 1990, Dr. Hale attended a meeting with five or six other departmental officials and representatives of the St. Paul School District. The purpose of the meeting was to discuss the St. Paul Proposal. Dr. Hale was not aware in advance of the meeting that the Proposal was to be discussed. The early part of the meeting was taken up with a presentation by the St. Paul School District of its concept paper. It became clear after the concept was presented that Commissioner Nelson wanted to move forward on the concepts of integrating special education and general education funding and streamlining the assessment of handicapped students. The Commissioner asked rhetorically to those in attendance at the meeting, "What can we do to get this passed?" At the meeting, Dr. Hale asked for a year to develop a proposal implementing the concepts contained in the St. Paul Proposal that would meet the requirements of federal law. Commissioner Nelson responded that he did not have a year and that he might not be Commissioner in a year. Dr. Hale felt excluded during the discussions and took personally what she considered to be a circumvention of her position. Dr. Hale was not asked to do anything specific with respect to the Proposal. She was aware, however, during the

meeting that the St. Paul Proposal represented a position of the Department and, particularly, of Commissioner Nelson. Dr. Hale asked for an opportunity to meet with Mr. Dailey to discuss federal program requirements. Dr. Hale also asked questions during the meeting about specifics of the Proposal and how federal regulations would be satisfied. Her questions received a general response that no federal regulations would be violated. Dr. Hale did not accept the assurances of the St. Paul School District that problems with federal regulations would be avoided. It was the clear understanding of those assembled at the meeting on February 22, 1990, however, that the group would work with the District to support the St. Paul Proposal being adopted into legislation.

19. On February 27, 1990, Dr. Hale met with Mr. Dailey of the St. Paul School District in her office. She gave Mr. Dailey a memo, prepared sometime earlier, which discussed federal regulations and federal special education program requirements. Dr. Hale believed that Mr. Dailey was inexperienced and not knowledgeable in federal special education fiscal and program issues. Mr. Dailey responded appropriately to Dr. Hale's comments but didn't ask for any further help. Dr. Hale did not draft any language or legislative proposals for Mr. Dailey. The meeting with Mr. Dailey was a usual part of Dr. Hale's work responsibility.

20. On March 3, 1990, Maja Weidmann, a legislative analyst working in the area of education contacted Dr. Hale. They discussed the St. Paul

Proposal, and, specifically, problems associated with commingling of education and special education funds. Ms. Weidmann and Dr. Hale agreed to meet to discuss the Proposal further.

21. On March 5, 1990, Dr. Hale met personally with Maja Weidmann. The Employee gave Ms. Weidmann a copy of the memo she had previously given to Mr. Dailey. The subject of the meeting was Dr. Hale's concerns about federal regulations that might be impacted by the St. Paul Proposal, particularly commingling of funds.

22. On March 5, 1990, Dr. Hale sent to Commissioner Nelson Employee Ex. 32, a memorandum which discusses Dr. Hale's concerns that implementation of the St. Paul Proposal would cause compliance problems with federal law. The memorandum of March 5, 1990, also advised the Commissioner that Dr. Hale had met with Mr. Dailey and Maja Weidmann.

23. Sometime during the week of March 5, 1990, Dr. Hale contacted an education official from the State of Iowa involved with special education. Apparently, the St. Paul Proposal was being compared by its supporters to some program or experience in Iowa. The Iowa official Dr. Hale contacted felt the St. Paul Proposal was a "bastardization" of the Iowa experience. That individual offered to come to Minnesota and testify against the Proposal. Dr. Hale contacted the Commissioner and told him that she could arrange to have the Iowa official come to Minnesota to meet with him and discuss the Iowa experience. Commissioner Nelson declined.

24. On March 8, 1990, Dr. Hale attended a Senate subcommittee meeting with Commissioner Nelson. They generally discussed topics related to special education. On March 12, 1992, at the request of the Commissioner, Dr. Hale met with him for approximately 45 minutes. The topic of their conversation was the specificity of the federal law and regulations related to special education. Dr. Hale believed that Commissioner Nelson was not knowledgeable about the specificity of federal law and regulations and did not appreciate

the potential fiscal impact of violating those regulations, at worst, a loss of \$30 million annually to the state education budget for special education.

25. Between Mae Gaskins' conversation with Dr. Hale on February 16 and March 20, a final draft of legislation to implement the St. Paul Proposal was prepared in a cooperative effort between persons in the Department of Education and the St. Paul School District. Dr. Hale was not consulted in that effort, other than as reflected in the previous Findings and her participation was not solicited. The persons who prepared the draft legislation considered Dr. Hale to be opposed to at least some of its policy objectives which had been endorsed by Commissioner Nelson. Dr. Hale was specifically opposed to using special education funds for "at risk" children.

26. Sometime prior to March 20, 1990, Dr. Hale was advised that the same group that had met on February 22, 1990 would reconvene to discuss the St. Paul Proposal. At that time, Dr. Hale was also aware that a legislative conference committee would be meeting on the evening of March 20, 1990, to adopt a conference committee report related to possible implementation of the St. Paul Proposal.

27. Dr. Hale had been working with a task force for some time that she had constituted on some of the same policy issues involved in the St. Paul

Proposal. On March 19, 1990, the task force met with Dr. Hale in attendance. Sometime between the task force meeting on March 19 and the meeting with Commissioner Nelson and others on March 20, 1990, Dr. Hale drafted an alternative proposal. The alternative proposal only addressed "mainstreaming". It did not deal with the use of special education funds for children who are only "at risk" and had not formally been determined to be in need of special education programs.

28. At the task force meeting, Dr. Hale told at least one other person, Judy Brown, a parent advocate, that the legislative conference committee would be meeting on March 20, 1990. She also later telefaxed copies of the draft proposal to several persons who were members of the task force. Dr. Hale was quite proud of the product she had produced.

29. On March 20, 1990, Dr. Hale attended a meeting in Commissioner Nelson's office with essentially the same people that had attended the meeting of February 22, 1990. Prior to the meeting, Dr. Hale met privately with Commissioner Nelson and told him she had prepared an alternative proposal. She asked if she could raise that subject at the meeting. He agreed that it would be appropriate. She again discussed with the Commissioner some of her concerns about the St. Paul Proposal as she understood it. During the meeting, much to Dr. Hale's surprise, draft legislation was advanced and discussed. The draft legislation had been reviewed by counsel and had been approved at the federal level for compliance with federal laws and regulations. Sometime towards the end of the meeting, or, even at its conclusion, Dr. Hale distributed the alternative proposal she had prepared. No one asked her any questions about the proposal and it was not discussed. Persons in attendance at the meeting concluded that Dr. Hale did not support the St. Paul Proposal. After the meeting, Dr. Hale told Assistant Commissioner Gaskins that she would not testify unless the Department asked her to do so. Dr. Hale also stated, "I assume the problems are fixed."

30. After the meeting on March 20, 1990, Dr. Hale believed that the St. Paul Proposal's potential conflicts with federal law and regulations had been resolved by the drafters of the proposal. She was not, however, asked at that time to support the Proposal, beyond what had already been said by Commissioner Nelson, and her assistance in presenting it to the conference committee was not requested. She did not specifically tell Commissioner Nelson or Mae Gaskins that she believed her concerns had been adequately addressed. She still did not, however, agree with using special education funds for "at risk" children.

31. On the evening of March 20, 1990, the conference committee met to consider a number of special education and education proposals, including the legislation discussed earlier in the Commissioner's office that embodied the St. Paul Proposal.

32. After their meeting on February 16, 1990, Mae Gaskins had requested that Dr. Hale not attend legislative hearings at which the St. Paul Proposal was to be discussed. Dr. Hale went to the evening conference committee meeting on March 20, 1990. The conference committee met outside of work hours and a number of special education bills were to be discussed. Dr. Hale brought with her copies of her alternative proposal. Mae Gaskins was in

attendance at the meeting. When she saw Dr. Hale, she summoned the Employee out of the committee hearing room and asked if she were planning to testify.

Dr. Hale responded that she did not intend to testify and would not testify on the St. Paul Proposal unless asked to do so. A question did arise during the hearing about the St. Paul Proposal and federal regulations. At Mae Gaskins' request, Dr. Hale responded to the question. Just before the hearing, the Employee gave a copy of her alternate proposal to a member of her task force who was present as a spectator at the conference committee meeting. Dr. Hale did not attempt to disseminate her draft proposal generally and did not try to discuss it with committee members or committee staff. She was, however, prepared to discuss her alternative proposal if it were raised by the conference committee. There is no evidence in the record that Assistant Commissioner Mae Gaskins knew at the time of the meeting that Dr. Hale had brought copies of the alternative proposal to the conference committee meeting.

33. Dr. Hale's concerns with the St. Paul Proposal were not peculiar to her. Robert Fisher, Supervisor of the Information Aids and Technical Unit of the Unique Learner Needs Section, discussed some of the same concerns with Maja Weidmann, at her request. He also provided Ms. Weidmann with some Departmental materials.

34. Robert Wedl, former Deputy Commissioner of Education under Commissioner Nelson, also initially had concerns with the St. Paul Proposal and its interaction with federal law and regulations. He, apparently, participated in or at least was aware of the process that was going on to refine the St. Paul Proposal into proposed legislation. Deputy Commissioner Wedl felt that his concerns were adequately addressed when the actual legislation was drafted. He did not share Dr. Hale's suspicion of Commissioner Nelson or Assistant Commissioner Mae Gaskins or of the motives or intentions of the St. Paul School District. Deputy Commissioner Wedl had substantial experience in special education fiscal requirements and applicable federal law.

35. Commissioner Nelson never gave individual persons any specific directives related to implementing the St. Paul Proposal and having it adopted as legislation. Everyone associated with the effort, however, including Dr. Hale, knew that the Commissioner and the Department supported the Proposal and that he wished it enacted into legislation.

36. Sometime in early April, before April 12, 1990, Commissioner Nelson met with Deputy Commissioner Wedl. Commissioner Nelson expressed a desire to remove Dr. Hale from her position as head of the Unique Learner Needs Section because of her lack of support for the St. Paul Proposal. The Commissioner

wanted to know what options were available to him in this situation. At Deputy Commissioner Wedl's direction, the Commissioner was made aware of the possible options that he had available to him, including discipline under the civil service system. Commissioner Nelson stated to Deputy Commissioner Wedl that he wished to talk to Dr. Hale about the options.

37. Sometime in early April 1990, before April 12, 1990, Commissioner Nelson told his cabinet meeting of Department of Education executives that Dr. Hale would no longer be Manager of ULNS. He discussed with them his dissatisfaction about her lack of enthusiasm for the St. Paul Proposal. The situation was discussed amongst those present. Several members of the cabinet, including Deputy Commissioner Wedl, believed it inappropriate that Dr. Hale be removed as ULNS Manager. Commissioner Nelson directed that a

position description be prepared for a new position In the Department dealing with early intervention for special education children.

38. On April 12, 1990, Commissioner Nelson called Dr. Hale to his office and, with Mae Gaskins also present, discussed a list of nine or ten concerns he had related to her performance, only one of which related to her lack of support for the St. Paul Proposal. His chief criticism seemed to be, however, that she "hadn't been up on the hill lobbying for the St. Paul Proposal." The Commissioner gave her three options: resign and obtain a new position outside of the Department; accept another level IV position; or do some special assignment work as had another high level person at the Department. At the end of the meeting, Dr. Hale was told that she had one week to choose an option.

39. On April 16, 1990, Dr. Hale submitted to Commissioner Nelson a memorandum which dealt with the concerns the Commissioner had expressed at their meeting of April 12, 1990, with specific proposals for meeting those concerns. She stated her commitment to address his concerns while she was Manager of the ULNS. Dr. Hale met with Commissioner Nelson on April 16, 1990, and they discussed her response to the concerns the Commissioner had expressed in their meeting of April 12, 1990. EE Ex. 24. During their meeting, Commissioner Nelson and Dr. Hale reviewed her memorandum of response. EE Ex. 24. At the conclusion of the meeting on April 16, 1990, he repeated that she had a week to inform him of the choice of option she would select.

40. Dr. Hale was out of the office during the week following her meeting with Commissioner Nelson on April 16. On April 19, while Dr. Hale was in Washington, D.C. on a preapproved trip related to special education, she received a message to call Assistant Commissioner Mae Gaskins and Commissioner Nelson. She returned the telephone call and was informed by Mae Gaskins that she must now select between the options presented by the Commissioner. Assistant Commissioner Gaskins and Dr. Hale agreed that the Commissioner would call the Employee on the morning of April 20, 1990. Commissioner Nelson called and asked Dr. Hale which option she had selected. Dr. Hale informed Commissioner Nelson that she would need two to three weeks to tie up loose ends at ULNS. Dr. Hale told Commissioner Nelson that she desired an Educational Specialist IV position within the Department in her area of expertise, special education, and did not wish to report to Assistant Commissioner Gaskins. She also stated that she wanted a developmental leave of one year and Departmental support for her position as head of the National Association of State Directors of Special Education (NASDE). Commissioner Nelson said, "Okay. I think we can do that." He stated that he would like to meet with her in the next several weeks to discuss the situation. No such meeting took place. On April 23, 1990, Deputy Commissioner Wedl called Dr. Hale and said that she should meet with him to talk about potential new work activities. She met with Deputy Commissioner Wedl and discussed potential work assignments.

41. On April 24, 1990, Dr. Hale was present in her office except for attendance at a meeting for a few hours in the afternoon. Sometime on April 24, 1990, in Dr. Hale's absence, Assistant Commissioner Gaskins and Commissioner Nelson had called two meetings of the Employee's staff. Her staff was told that she would no longer be Manager of ULNS and that Wayne Erickson, the former Director of Special Education for the Department of Education who was now head of the Curriculum Services Section, would be in

charge of ULNS. At the time of the meetings with her staff, Dr. Hale had not been informed either that the meetings would take place or that the Commissioner had decided on a date for her removal as head of ULNS.

42. On April 25, 1990, Dr. Hale was in her office part of the day and on work assignment outside of the office part of the day. On the morning of April 25, 1990, a staff person told her about the staff meetings on April 24th and what had been said by Assistant Commissioner Gaskins and Commissioner Nelson. Late in the afternoon when she returned to her office from a meeting she found a memorandum on her chair, EE Ex. 25, from Mae Gaskins, which stated:

Subject: Change in Position.

Effective April 24, 1990, you no longer have authority to manage the activities, budget, and personnel of the Unique Learner Needs Section. Your assignment from this date will be determined by the Commissioner and you should report directly to Deputy Commissioner Wedl.

43. Upon Dr. Hale's removal as Manager of ULNS, Wayne Erickson was assigned as the new manager. Mr. Erickson, up to April of 1990, had been serving as Manager of Curriculum Services, another coequal section of the Department. Manager of Curriculum Services is the position now held by Dr. Hale. It is an Education Specialist IV position. Between the date that Wayne Erickson became manager of ULNS, April 24, 1990, and the date that Dr. Hale assumed his position, November 14, 1990, the position of Manager of Curriculum Services Section was vacant. It was filled by a person working out of class.

44. By the time that Dr. Hale was relieved as Manager of the ULNS, she had retained an attorney. On or about April 26, 1990, at the direction of Assistant Commissioner Gaskins, clerical personnel from ULNS attempted to "evict" Dr. Hale from her office and move in Mr. Erickson's effects. Through the intervention of her attorney and an attorney from the Office of the Attorney General, it was determined that Dr. Hale could remain in her office temporarily. Dr. Hale was in possession of her office from April 25 through May 23, 1990. On May 23, 1990, she temporarily moved into Peter Marino's office in his absence. She remained physically housed in Mr. Marino's office until the end of July. After that time, other office space was provided.

45. When Dr. Hale received notice of her removal as Manager of ULNS or

April 25, 1990, she had no assigned duties and did not know what her duties were to be. She had previously received approval to attend a continuing education conference in her area of expertise. She attended that developmental seminar during the end of April and early May. When she returned from the conference on May 8, 1990, she undertook the task of writing the performance reviews for her former employees in ULNS. They were to be signed by the new manager, Wayne Erickson. Sometime at the end of May, Dr. Hale took an unspecified amount of accumulated leave that she would have lost if it were not taken before the end of the fiscal year.

46. Between April 25 and sometime in July 1990, Dr. Hale supervised no budget and had no employees. Sometime in late May 1990, she was loaned a microcomputer for her use. After the first week of July 1990, two employees, including one clerical person, were transferred to Dr. Hale's supervision.

47. It was Dr. Hale's understanding that the position to be developed for her would relate to early intervention for young special education services candidates. Hence, in June and early July 1990, she prepared background information on matters related to early childhood special education concerns. In August or early September of 1990, Dr. Hale prepared one project grant, performed some NASDE work, and made one presentation in Bemidji.

48. On November 7, 1990, Dr. Hale was advised that she had been transferred to her present position as Manager of the Curriculum Services Section, effective November 14, 1990. That position, which requires an Education Specialist IV classification, had formerly been held by Wayne Erickson. The position was not, however, in the area of special education and the incumbent reported to Assistant Commissioner Mae Gaskins.

49. When Deputy Commissioner Wedl knew that Dr. Hale was to be relieved of her duties as Manager of the ULNS, he attempted in good faith to construct an equivalent position which would carry an Education Specialist IV classification within the special education area of the Department of Education. On April 9, 1990, Deputy Director Wedl requested that Mr. Escher, the Personnel Director within the Department of Education, outline the alternatives available in dealing with Dr. Hale. EE Ex. 2. Deputy Commissioner Wedl believed, as a result of Dr. Hale's conversations with the Commissioner, that Dr. Hale desired to have an Education Specialist IV position within the Department in the area of special education that did not report to Mae Gaskins.

50. In April of 1990, the Department, through Deputy Commissioner Wedl and Mr. Escher, began discussions with the Department of Employee Relations (DOER) about a position for Dr. Hale within the special education area of the Department. In the past, some persons in an unusual situation had taken a leave of absence to do a special project for the Department within their area of expertise. This would normally be a temporary unclassified position. The Department considered it easier to justify such a temporary position to DOER than a new, high-level classified position. At least initially, the position being developed for Dr. Hale was such a special projects unclassified position. The Department recognized, however, that Dr. Hale would have to specifically request a leave of absence to take the position, and, hence, could not be required to take the unclassified position. Early in their discussions with DOER, the Department was informed that they could have up to one year to finalize a position for Dr. Hale. During that one year period, Dr. Hale would retain her Education Specialist IV civil service classification and remain within her current personnel complement. The Department of Employee Relations considered this one-year period to be reasonable, given the high level of the position to be developed and the fact that the duties

associated with the position were in a state of flux. On many other occasions, DOER had allowed the Department a similar period of time to finalize high-level positions.

51. On April 25, 1990, Deputy Commissioner Wedl sent to Mr. Escher a list of the duties he would like included in the position that was to be developed for Dr. Hale. The major responsibilities dealt with early intervention for handicapped and at risk children. Dr. Hale was also to take responsibility regarding the Governor's STEP program by coordinating early intervention in state departments that dealt with handicapped and at risk

children. EE Ex. 6. Staff development and grant writing were also to be part of her responsibilities.

52. About April 26, 1990, Dr. Hale met with Mr. Escher and informed him that she would not cooperate in accepting an unclassified position with the Department in the area of special education. After that comment by Dr. Hale, the efforts of the Department were focused on developing a permanent classified position for the Employee within the area of special education.

53. Between April 23 and the end of October 1990, Dr. Hale met with Deputy Commissioner Wedl on approximately 30 occasions. The subject of all of these discussions was the configuration of the position that was being developed for Dr. Hale at her request. At a meeting of May 11, 1990, for example, Dr. Hale assumed some grant writing responsibility. She met with Deputy Commissioner Wedl to discuss her duties again on May 23, June 14, and July 11, 1990. Over the course of these discussions, a position and responsibilities for Dr. Hale gradually took shape. On October 26, 1990, Deputy Commissioner Wedl gave Dr. Hale a position description reflecting the duties of the position developed. EE Ex. 27. Dr. Hale had previously indicated to Deputy Commissioner Wedl that she had no intention of signing the position description.

54. By Order of Administrative Law Judge Allan W. Klein, the Minnesota Department of Employee Relations conducted an "informal" audit of the position description contained in EE Ex. 27. The "informal" audit of the position conducted by DOER, dated May 23, 1991, showed that the position would only carry a classification of Education Specialist II.

55. Deputy Commissioner Wedl knew that the position reflected in EE Ex. 27 did not have duties comparable to the position Dr. Hale left. He was aware that it carried significantly less managerial responsibility, programs and budget. His attempts to transfer additional duties to Dr. Hale were, however, limited by Mr. Erickson refusing to relinquish responsibilities of the ULNS section and by Dr. Hale's own expressed desire to remain within the area of special education and not report to Mae Gaskins.

56. A state employee in the classified service has no legal right to a particular assignment of duties, absent special contract, and duties may be reassigned, as long as no "demotion" is involved within the meaning of Minn. Stat. 43A.33, subd. 1 (1990).

57. The current position of Dr. Hale, Manager of the Curriculum Services Section of the Department of Education, is a job comparable to that she left as Manager of the ULNS, and her immediate reassignment to that position would not have raised any possible claim of demotion under Minn. Stat. 43A.33, subd. 1 (1990).

58. Dr. Hale did not, in any way, refuse to cooperate with Deputy Commissioner Wedl or the Department in developing a suitable Education Specialist IV position for her within the Department. Both Dr. Hale and Deputy Commissioner Wedl acted in good faith in attempting to create a

position suitable for the Employee in her area of expertise, special education.

59. On May 12, 1990, Dr. Hale addressed a memorandum to Commissioner Tom Nelson in which she stated she believed that her removal as ULNS Manager

constituted an inappropriate disciplinary action. She requested a developmental leave of one year. On May 29, 1990, Deputy Commissioner Wedl responded to Dr. Hale's May 12, 1990 memorandum. He stated that the Department did not consider that any discipline had occurred because the Employee was reassigned from one Education Specialist IV position to another.

Deputy Commissioner Wedl stated that reassignment was a management prerogative. DOE Ex. E.

60. At the time of her removal as Manager of ULNS, Dr. Norena Hale was subject to the Managerial Plan in effect July 1, 1989 - June 30, 1991. The Administrative Law Judge took administrative notice of the Managerial Plan on

August 21, 1992, with the consent of both counsel.

61. Minn. Stat. 43A.33, subd. 3 (1990), in relevant part, provides:

Procedures for employees not covered by collective bargaining agreement shall be governed by this subdivision and by the commissioner's and managerial plans.

62. Minn. Stat. 43A.18, subd. 3 (1990), provides:

The commissioner shall identify individual positions or groups or groups of positions in the classified and unclassified service, in the executive branch as being managerial. The list shall not include positions listed in subdivision 4. The commissioner shall annually submit the listing of positions to the chair of the legislative commission on employee relations for the commissioner's review and comment and shall note on each listing the changes from the prior year.

(a) The commissioner shall periodically prepare a plan for total compensation and terms- and conditions of employment for employees of those positions identified as being managerial and whose salaries and benefits are otherwise provided for in law or other plans established under this chapter. Before becoming effective, those portions of the plan establishing compensation and terms and conditions of employment shall be reviewed and approved or modified by the legislative commission on employee relations and the legislature in the same manner as provided for the commissioner's plan in subdivision 2. (Emphasis added.)

Subdivision 2 of Minn. Stat. 43A.18 (1990) provides that the Commissioner's Plan cannot take effect until approved by the legislature.

63. The Managerial Plan in effect July 1, 1989 - June 30, 1991 contains the following definition at page A-1:

"Demotion" means a downward movement of a manager from a position in one class to a position in another class where the second class is assigned to a lower salary

range and where the classes are not transferable.

The Managerial Plan, at page A-1, also defines a "class" as:

one or more positions sufficiently similar with respect to duties and responsibilities that the same descriptive title may be used with clarity to designate each position allocated to the class, that the same general qualifications are needed for performance of the duties of the class, that the same test of fitness may be used to recruit employees, and that the same schedule of pay can be applied with equity to all positions in the class and to the same or substantially the same employment conditions.

64. On May 25, 1990, the Employee submitted to the Office of Administrative Hearings a Notice of Appeal and Request for Hearing, pursuant to the Managerial Plan of the Department of Employee Relations and Minn. Stat.

43A.33 (1990).

65. On June 18, 1990, a Notice and Order for Hearing was issued by the Office of Administrative Hearings.

66. During the proceeding, because of a jurisdictional ruling by Administrative Law Judge Neilson, Dr. Hale brought an action in district court under the whistleblower statute, Minn. Stat. 182.932, subd. 1(A) (1990). In an Order dated July 23, 1991, District Court Judge Fitzpatrick determined that the St. Paul Proposal was not illegal and that there was nothing illegal about the implementing legislation or its underlying objectives. Because the legislation was not illegal or did not mandate illegal activity, Judge Fitzpatrick determined that the statute had no application to Dr. Hale's conduct. The Employee did not appeal Judge Fitzpatrick's Order of July 23, 1991.

67. The Department stipulated at the hearing that Dr. Hale's removal from the position of Manager, ULNS was solely because of her conduct with respect to a lack of support for the St. Paul Proposal.

68. There is no evidence in the record that Dr. Hale was insubordinate in reference to the St. Paul Proposal or that her conduct with respect to the St. Paul Proposal in any manner supports a disciplinary action against her.

69. Between the date Dr. Hale was removed from her position as Manager of ULNS, April 24, 1990, and the current date, the Employee has retained her civil service classification as Education Specialist IV, her salary and all benefits uninterrupted.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge has jurisdiction in this proceeding pursuant to Minn. Stat. 43A.33 (1990).

2. The Notice of Hearing issued by the Office of Administrative Hearings was in all respects proper with regard to form, content, execution

and filing. All substantive and procedural requirements of law or rule have fulfilled.

3. The Employee, Dr. Norena A. Hale, is a permanent employee in the classified service of the State of Minnesota within the meaning of Minn. Stat.

43A.33 (1990).

4. The Employee cannot be demoted except for "Just cause". Minn. Stat.

43A.33, subd. 1 (1990).

5. The burden of establishing the fact that a demotion has occurred as a result of the Employee's removal from her position as Manager of the Unique Learner Needs Section is on the Employee.

6. The Employee has failed to establish that her removal as Manager of the Unique Learner Needs Section constituted a demotion within the meaning of Minn. Stat. 43A.33, subd. 1 (1990). The Employee has been reassigned to an admittedly equivalent position. The hiatus in her duties between April 25, 1990 and November 14, 1990 was the result of a good faith effort by the Department to develop a new Education Specialist IV position in which Dr. Hale could use her expertise in the area of special education and not report to Assistant Commissioner Mae Gaskins. These objectives were set by the Employee herself. See Finding 40, supra.

7. Both the Employee and the Department acted in good faith during this interim period to satisfy both the reassignment desire of the Commissioner and the job duty preferences of the Employee.

8. Dr. Hale's conduct with respect to the St. Paul Proposal in the spring of 1990 did not constitute insubordination or provide a ground for discipline.

9. The reassignment of Dr. Hale to Manager of the Curriculum Services Section was not in violation of her First Amendment rights.

10. Any Conclusion more properly termed a Finding of Fact, and any Finding of Fact more properly termed a Conclusion is hereby expressly adopted as such.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

The Appeal of the Employee, Dr. Norena A. Hale, dated May 25, 1990, asserting that her removal as Unique Learner Needs Section Manager with the Department of Education was a demotion without just cause under Minn. Stat.

43A.33, subd. 1 (1990) and the Managerial Plan of the Department of Employee Relations, is hereby DISMISSED.



actually been demoted and treated the change of job duties as such under its internal procedures.

The jurisdiction of the Administrative Law Judge is stated in Minn. Stat.

43A.33 (1990). The Administrative Law Judge only has jurisdiction to conduct a hearing with respect to a personnel action affecting a classified employee in state civil service if the action constitutes a reprimand, discharge, suspension without pay or demotion. Minn. Stat. 43A.33 (1990).

No member of the State Civil Service, however, absent a special agreement or

contract, has a civil service right to a particular set of duties or assignments. *Temporo y*,. Commonwealth of Pennsylvania, 403 A.2d 226, 228-29

(Pa. Cmwlth. 1979); *Delong, v. United States*, 621 F.2d 618 (4th Cir. 1980); *Leonard v. Suthard*, 927 F.2d 168, 170 (4th Cir. 1991); *State ex. rel Ogen v.*

Teater, 375 N.E.2d 1233, 1239 fn. 4 (Ohio 1978); Carr v.-Commonwealth, 456 A.2d 240, 242 (Pa. Cmwlth. 1983). The State appointing authority need never establish just cause for a reassignment, then, if the reassignment is not a demotion within the meaning of Minn. Stat. 43A.33, subd. 1 (1990). The burden is on the employee to establish that the personnel action complained of constitutes a demotion. Ahern v. Chestter-Upland School District, 582 A.2d 741 (Pa. Cmwlth. 1990).

Minn. Stat. 43A.33, subd. 1 (1990) does not contain a statutory definition of the word "demoted", and the general definition section of the chapter, likewise, does not define the terms "demoted" or "demotion". Minn. Stat. 43A.02 (1990). The Employee invites the Administrative Law Judge to adopt a "common sense" definition of the term "demotion" in this case. She argues that any significant change or diminution in job responsibilities constitutes a demotion within the meaning of Minn. Stat. 43A.33, subd. 1 (1990) because the position is lessened or lowered in rank or importance. The Department, on the other hand, argues that the civil service practices of DOER are controlling and that no demotion can occur unless it is reported as a demotion and treated by DOER for payroll purposes as a demotion.

Department of Employee Relations Administrative Procedure 15.6, effective June 13, 1984, defines the word "demotion" as "the movement of an employee to a class assigned to a salary range which is two or more steps lower at the maximum". That definition is, however, not applied in a disciplinary context. It relates to payroll procedures. The Administrative Law Judge does not wholly adopt the position of either party regarding the appropriate definition of the word "demoted" in Minn. Stat. 43A.33, subd. 1 (1990).

At the time of her loss of duties as Manager of ULNS, Dr. Hale was governed by the Managers Plan effective July 1, 1989 through June 30, 1991. A copy of that plan has been the subject of administrative notice. Minn. Stat.

43A.33, subd. 3 (1990), in relevant part, provides:

Procedures for discipline and discharge of employees covered by collective bargaining agreements shall be governed by the agreements. Procedures for employees not covered by a collective bargaining agreement shall be governed by this subdivision and by the commissioner, and managerial plans.

Further, Minn. Stat. 43A.18, subd. 3 (1990), specifically recognizes the official status of the Managers Plan for those employees subject to the Plan. Minn. Stat. 43A.18, subd. 3(a) (1990) provides, in relevant part:

The commissioner shall periodically prepare a plan for total compensation and terms and conditions of employment for employees of those positions identified as being managerial and whose salaries and benefits are not otherwise provided for in law or other plans established

under this chapter. Before becoming effective, those portions of the plan establishing compensation and terms and conditions of employment shall be reviewed and approved or modified by the legislative commission on employee relations and the legislature in the same manner as provided for the commissioner's plan in subdivision 2.

The Administrative Law Judge, therefore, believes that the appropriate definition of the word "demoted" in Minn. Stat. 43A.33, subd. 1 (1990), as applied to Dr. Hale, depends not on a common law definition or a common sense definition, but on the definition, if any, contained in the Managers Plan. Such a definition would set a term or condition of employment within the meaning of Minn. Stat. 43A.18, subd. 3 (1990) and Minn. Stat. 43A.33, subd. 3 (1990). Such definitions have also been specifically approved by the Legislative Commission on Employee Relations and the legislature itself. Chapter 10 of the applicable Managers Plan discusses disciplinary actions, including "demotion". Chapter 11 of the applicable Managers Plan discusses the rights available to an employee subject to the Managers Plan if a "demotion" occurs. Page 11-1 of the applicable Managers Plan contains a specific reference to Minn. Stat. 43A.33 (1990), and the hearing rights of the employee who has been subject to a "demotion". Appendix A to the applicable Managers Plan contains the following definition:

"Demotion" means the downward movement of a manager from a position in one class to a position in another class where the second class is assigned to a lower salary range and where the classes are not transferable.

Managers Plan 1989-1991, Appendix A, p. A-1. At the same page of the Managers Plan, the following definition is included:

"Class" means one or more positions sufficiently similar with respect to duties and responsibilities that the same descriptive title may be used with clarity to designate each position allocated to the class, that the same general qualifications are needed for performance of the duties of the class, that the same tests of fitness may be used to recruit employees, and that the same schedule of pay can be applied with equity to all positions in the class under the same or substantially the same employment conditions.

Managers Plan 1989-1991, Appendix A, p. A-1. Page A-2 of the Managers Plan, in effect in 1990, defines the term "reassignment" as "the management-directed movement of an employee between two positions in the same class and agency."

When a court has been faced with a claim of demotion because of a change in duties where there is a rule or regulation that defines demotion, it has applied the applicable rule or regulation without reliance on some common sense or common law definition of the term "demotion". *Silverman v. Commonwealth*, 454 A.2d 185 (Pa. Cmwlth. 1982); *GAlatti v. Countv of Dutchess*, 64 N.Y.2d 1163, 480 N.E.2d 678 (N.Y. Ct. App. 1985); *Hardy v. Singer*, 392 Mich. 1, 219 N.W.2d 61 (1974); *Shaefer v. West Chester State College Department of Education*, 421 A.2d 502 (Pa. Cmwlth. 1980); *Bayhi v. Department of-Health-And Human Resources*, 408 So.2d 395 (La. App. 1981); *Fowler-v. Knox County-Merit System Council*, 798 S.W.2d 762 (Tenn. App. 1 990) *Adelman v!* *Bahou*, 85 A.D.2d 862, 446 N.Y.S.2d 500 (Sup. Ct. 1981).

The definition of the word "demotion" contained in the applicable Managers Plan may be read in either of two ways. Since the definition references the downward movement of the manager, it may require that either

the civil service classification or salary of the employee be reduced before a demotion occurs. In *Bayhi v. Department of Health and Human Resources* 408 So.2d 395 (La. App. 1981), the court was interpreting a rule that defined demotion as being a change of an employee from a position in one class to a position in another class for which a lower minimum rate of pay is presented. The court refused to find a demotion because no change of civil service classification was alleged and the employee's wage was not reduced. In *Shaefer v. West-Chester State College Department of Education* 421 A.2d 502 (Pa. Cmwlth. 1980), the employee experienced a reduction in duties but kept his civil service title and salary. The court was interpreting a statute that defined demotion as a change in status to a position in a class carrying a lower maximum salary. The court refused to find a demotion in the absence of a reduction in either the civil service classification or salary of the employee. In *Silverman v. Commonwealth*, 454 A.2d 185 (Pa. Cmwlth. 1982).

A second possible interpretation of the definition is that the employee need not experience a reduction in civil service classification or salary as long as he or she is permanently and involuntarily assigned for disciplinary reasons to a position that has been classified by the appropriate civil service authority as being within a class that carries a lower salary range. In *Hardy, v. Singer*, 219 N.W.2d 61, 63 (Mich. 1974), the court was interpreting a civil service commission rule that defined a demotion as:

a transfer of a status employee from a position which he occupies in one class to a position in another class at a lower classification level.

The court held that the classification of the second position was determinative, not the impact, if any, on the employee. The court also recognized, however, that the responsibility for determining the appropriate classification of the second position belonged to the civil service commission.

Applying the two possible interpretations of the definition of demotion contained in the applicable Managers Plan to the facts of this case, Dr. Hale was not demoted. During the seven-month hiatus between her removal as ULNS Manager and her assuming the position of Manager of the Curriculum Services Section of the Department, she retained her civil service classification, salary and full benefits. While Dr. Hale was performing the duties of her substitute position, it had no civil service classification assigned, other than her classification of Education Specialist IV which she was allowed to retain while the position was being developed and finally evaluated. While she was performing the duties of her substitute position, it was not, in any sense, within a second class assigned to a lower salary range. Even if the definition were read, therefore, to allow a finding of demotion when an incumbent retains his or her civil service title and salary but performs the duties of a position in a lower class, Dr. Hale was not demoted. DOER had reasonably delayed classifying the duties of the substitute position and while she was performing the duties, they had not been determined by DOER to be within a lower class.

It could be argued that the analysis of the Administrative Law Judge

allows an appointing authority to virtually eliminate the duties of an incumbent, without recourse, as long as the same civil service classification is maintained and the employee's salary is not reduced. That is not the result. Under the applicable civil service law, the appointing authority, the

employee or even DOER, on its own motion, can cause a job evaluation or assessment to be performed. That was done in this case. If DOER finds that the duties of an incumbent in a position, as currently performed, do not support a particular civil service classification, the appointing authority must either add additional duties to that position to justify retention of its current civil service classification for the incumbent or declare a vacancy in that position, triggering the incumbent's civil service rights, including "bumping". Even if an employee whose duties have been changed may not claim immediate relief from the Office of Administrative Hearings, that person has a right under the civil service law to review by the Department of Employee Relations. The prospect of an employee being placed in "coventry" until he or she resigns is not a likely scenario under state civil service law. The Administrative Law Judge believes that this view of the relationship between relief that may be afforded by the Office of Administrative Hearings and DOER preserves for each its appropriate ambit of authority without encroaching on the expertise or statutory responsibility of either agency.

There is some judicial authority that may recognize a right of relief for an employee when his or her duties have been so significantly reduced in bad faith that the effect is a constructive discharge. See *Chiero v. Bureau of Motor Vehicles*, 55 Ohio Misc. 22, 381 N.E.2d 219 (Cmn. Pls. Ohio 1977); *Department of General-Services v. Johnson*, 405 A.2d 596 (Pa. Cmwlth. 1979); *Gonzalez v. Ohio Bureau of Employment Services*, 68 Ohio App. 243, 429 N.E.2d 448 (Ohio App. 1980). In *Ammend v. County of Isanti*, 487 N.W.2d 3 (Minn. App. 1992), the court held that a significant reduction in the duties of the chief deputy of a sheriff's department designed to force him to resign was a "demotion" within the meaning of the Veterans Preference Act, Minn. Stat. 197.46 (1990). In *Ammend*, supra, however, there was no applicable definition in the statute of the term "demotion". Here, the Managers Plan does provide such a definition.

The Administrative Law Judge believes that *Ammend*, supra, and other decisions may be reconciled with the analysis previously adopted. In all of these cases, an appointing authority, in bad faith, significantly reduced the work assignments of an employee to force the employee to resign. Such actions might be considered a constructive discharge. If that result occurred under Minn. Stat. 43A.33, subd. 1 (1990), where no reduction in civil service classification or pay occurred, the employee would have the protections of DOER and job evaluation process previously discussed. Moreover, if the reduced duties assigned had been classified by DOER to be within a lower class, relief might be obtained immediately from the Office of Administrative

Hearings under the second definition of demotion considered.

Even if there may be some "bad faith" exception where the facts amount to a constructive discharge, that analysis has no application to the facts of this case. When Dr. Hale was informed of her options and the desire of the Commissioner to remove her as Manager of ULNS, she specifically asked the Department to develop a new comparable position within the area of special education that would have different reporting responsibility. see Finding 40, supra. Immediate reassignment of Dr. Hale to Wayne Erickson's position as Curriculum Services Manager would not have been in accordance with the Employee's stated wishes. That position reported to Assistant Commissioner Mae Gaskins and was outside of the area of special education. From the time that Deputy Commissioner Wedl learned that Commissioner Nelson wished to relieve Dr. Hale of her duties as head of ULNS, he began negotiating with DOER

to create a new position that would meet the requirements of the Commissioner, DOER and the Employee. In retrospect, that may have been an impossible task. At the time, however, he began, in good faith, to attempt to develop such a position within the Department. He received from DOER a reasonable period of time within which to accomplish his objective, during which Dr. Hale could maintain her then current civil service classification and position allocation. The period selected was reasonable because of the high level of the position to be created and the fact that the duties of the position had to be defined and were in a constant state of flux. Deputy Commissioner Wedl met on at least 30 occasions with Dr. Hale in an attempt to develop an appropriate position. When he believed it likely that he could not meet Dr. Hale's objectives within the parameters under which he was working, Deputy Commissioner Wedl caused the Employee to be transferred to an admittedly equivalent position as Manager of the Curriculum Services Section in November of 1990. Any delay in finally assigning the Employee to an admittedly comparable position was not the result of bad faith, but a good faith attempt on the part of Deputy Commissioner Wedl to implement her wishes. Under such circumstances, Dr. Hale should not be heard to complain.

It is also important to note that Deputy Commissioner Wedl was sympathetic to Dr. Hale's situation. He, like Dr. Hale, had initial concerns about the St. Paul Proposal and its implementation. He did not share Commissioner Nelson's belief that Dr. Hale should have been removed as Manager of ULNS. Finally, Dr. Hale does not assert, in either her hearing testimony or memoranda, that either Deputy Commissioner Wedl or Donald Escher, the former Director of the Office of Employee Relations for the Minnesota Department of Education, were not acting in the utmost good faith to attempt to retain Dr. Hale in a position within her area of expertise.

Although the Administrative Law Judge has found that Dr. Hale was not demoted but was reassigned, some comment about the "Just cause" standard is appropriate. The only assertion by the Department that Dr. Hale's conduct constituted just cause for discipline concerns her actions related to the St. Paul Proposal. In all other respects, her performance as a career civil servant had been recognized by the Department to be exemplary. See Finding 4, supra.

Minn. Stat. 43A.33, subd. 1 (1990) provides that specified discipline can only be imposed for just cause. In *Hagen v. Civil Service Board*, 164 N.W.2d 629, 631-32 (Minn. 1969), the court interpreted the just cause standard as applied to a state civil servant as follows:

. . . Minn. Stat. 43.24, subd. 1, requires that disciplinary action may be taken only for "just cause". The latter term was discussed in *State ex rel. Hart v.*

Common Council, 53 Minn. 238, 244, 55 N.W. 118, 120,  
where it was said:

\* \* \* 'Cause', or 'sufficient cause', means 'legal  
cause', and not any cause which the council may  
think sufficient. The cause must be one which  
specially relates to and affects the administration  
of the office, and must be restricted to something  
of a substantial nature directly affecting the  
rights and interests of the public. The cause must

be one touching the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office. An attempt to remove an officer for any cause not affecting his competency or fitness would be an excess of power, and equivalent to an arbitrary removal. In the absence of any statutory specification the sufficiency of the cause should be determined with reference to the character of the office, and the qualifications necessary to fill it.

Under this definition it appears that the cause or reason for dismissal must relate to the manner in which the employee performs his duties, and the evidence showing the existence of reasons for dismissal must be substantial . . . .

The Department asserts that Dr. Hale failed to do her job in relation to the St. Paul Proposal. The Administrative Law Judge accepts this characterization as a charge of either incompetence or insubordination. Incompetence is defined as the lack of necessary job skills or qualifications or the failure over time to use skills possessed. *Collins v, Iowa Liquor Control-Commission*, 110 N.W.2d 548 (Ia. 1961). There is no evidence in the record that Dr. Hale was incompetent. She is a superior civil servant whose skills were recognized by the Department both before and after the events surrounding the St. Paul Proposal in 1990. See Finding 4, *supra*. Moreover, insubordination has been defined as the failure by an employee to carry out the lawful order of a superior. 67 C.J.S. Officer; *Forstner v. City and County of San-Francisco*, 52 Cal. Rptr. 621, 243 Cal.App.2d 625 (1966). There is no evidence in the record that Dr. Hale refused to carry out a specific directive from any superior within the Department of Education. At most, her actions were interpreted by the Commissioner to evidence some lack of loyalty or enthusiasm in accomplishing his policy goals. The Department has failed to establish just cause for taking any disciplinary action against Dr. Hale.

The Employee also claims that she has protectable First Amendment rights that entitle her to reinstatement. Since the personnel action complained of has been found to be only a reassignment and not a reviewable disciplinary action under Minn. Stat. 43A.33 (1990), it is doubtful that the Administrative Law Judge has authority to set aside the reassignment on the grounds of First Amendment claims. That is not to say that some other forum may not be appropriate, such as a claim under 42 U.S.C. 1983. The caselaw, however, generally denies recovery when the adverse personnel action

complained of is not the substantial equivalent of dismissal. Lee, e.g., Delong v. United States, 621 F.2d 618, 623-24 (4th Cir. 1980). Dr. Hale's reassignment in this case is not the substantial equivalent of discharge.

Even if, however, the Administrative Law Judge has authority to review the employee's First Amendment claims when no adverse personnel action recognized by Minn. Stat. 43A.33, subd. 1 (1990) has taken place, the Employee still would not be entitled to reinstatement. In certain circumstances, any employee has protection against an adverse personnel action

for the exercise of First Amendment rights. *Pickering v. Board of Education* 391 U.S. 563 (1968); *McIntire-v.-state*, 458 N.W.2d 714 (Minn. App. 1990). The Employee must first establish that the adverse personnel action was the result of protected speech. *Mt. Healy v. Doyle* 429 U.S. 274 (1977); *King v. Board of Regents*, 898 F.2d 533, 538 (7th Cir. 1990). In this case, the Commissioner believed that Dr. Hale, by her repeated adverse contacts with him concerning the St. Paul Proposal, was not supporting his policy determinations. It is the Commissioner who sets Department policy, not the Employee. As long as no illegal action is proposed, the Employee has the responsibility of supporting and furthering the Commissioner's policy objectives. The Employee was not transferred because she expressed a First Amendment opinion. The transfer occurred because the Commissioner believed that the totality of the Employee's actions demonstrated that she would not actively further his policy objectives. The Employee had a personality dispute with her supervisor, Assistant Commissioner Mae Gaskins, and a low opinion of Commissioner Nelson's commitment to follow applicable federal rules and regulations in the area of special education. Other persons raised concerns about the St. Paul Proposal, including Deputy Commissioner Wedl and no adverse personnel action or reassignment occurred. The Employee was not reassigned because she exercised protected First Amendment rights.

B.D.C.